SUPREME COURT OF THE UNITED STATES.

No. 372.

MARSHALL BROWN AND JESSE B. HAW, PLAINTIFFS IN ERROR,

vs.

JOHN WILEY AND EMILY F. WILEY.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between John Wiley and Emily F. Wiley, petitioners, and Marshal Brown and Jesse B. Haw, respondents, a manifest error hath happened, to the great damage of the said respondents, as by their complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable S. P. Chase, Chief Justice of the United States, this 6th day of June, in the year of our Lord 1866, and of the independence of the United States the 90th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Emily F. Wiley:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Marshall Brown is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Just.*

We acknowledge service of this citation June 6, 1866.

BRENT & MERRICK,
For Def't in Error.

2

3 DISTRICT OF COLUMBIA, *to wit:*

As commanded by the foregoing writ of error, I, Return J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify and transmit to the Supreme Court of the United States a true

copy of the record and proceedings mentioned in said writ of error, with all things touching the same, which copy is hereto annexed.

In testimony whereof I have caused the seal of the said supreme court of the District of Columbia to be hereunto affixed, at the city of Washington, this 6th day of June, 1866.

[SEAL.]

4 *Petition of John and Emily F. Wiley.—Filed in law 14th April, 1863.*

To the Hon. W. F. Purcell, judge of the orphans' court of Washington county, in the District of Columbia:

The petition of John Wiley and Emily F., his wife, respectfully showeth unto your honor that the said Emily F. is the sole and lawful child of a certain Tillotson P. Brown, late of Washington city; that her mother, Elizabeth Brown, the widow of said Tillotson P. Brown, duly administered in your honorable court on the estate of said decedent; that more than twelve months having elapsed since the granting of said letters to her, and the time limited by an order of your honor for creditors to file their claims having also expired, and due notice of said order being published as directed therein, the said administratrix is anxious to pass her final account distributing the surplus assets remaining in her hands, and which your petitioners aver exceeds the sum of $15,000, and for that purpose hath obtained an order from your honor requiring all creditors and distributees of said estate to appear before your honor on the 7th day of February
5 next for the purpose of a final distribution of said estate, which last order your petitioners state has been published as directed therein.

Your petitioners further show, that a certain Marshall Brown and Jesse Haw, of said Washington county, falsely pretend and claim that the said Tillotson P. Brown left no lawful issue surviving him, and that they, together with a certain George B. Prentice, of the State of Illinois, or some of them, are the nearest of kin to said Tillotson P. Brown, who died, as your petitioners admit, intestate; and they further pretend and claim, that as such next of kindred, they and the said Prentice, or some of them, are entitled, as distributees, to all of the assets of said estate now in the hands of said administratrix for distribution, exclusive of said widow's distributive share thereof.

Your petitioners further show that said claim and pretence of said Marshall Brown and Jesse Haw is wholly unfounded and false, and only designed to harass, annoy, and prejudice your petitioner, Emily F., in her just rights; and your petitioners are advised that they are entitled to be considered in right of your petitioner, Emily F., as the sole next of kin of said decedent, and as such entitled to the
6 whole assets remaining for distribution, after deducting said widow's share, and subject to the provisions of a deed made by your petitioners, a copy of which is herewith filed as part of this petition.

Wherefore your petitioner prays that an order may be passed by your honor specially notifying the said Marshall Brown and Jesse Haw, of said county, of this petition, and to appear before your honor on said 7th day of February next, and show cause, if they can, why your petitioner, Emily F., is not entitled to claim her distributive share as the only lawful issue of said Tillotson P. Brown, and that in the event of her said claim and title being disputed by the said Marshall Brown and Jesse Haw, or either of them, that a plenary proceeding may be directed and issues framed under the direction of your honor, and that your petitioner, Emily F., may have her just rights in the premises, and her distributive share of said estate; and as in duty, your petitioners will ever pray.

JOHN WILEY.
EMILY F. WILEY.

7 DISTRICT OF COLUMBIA, *Washington County, to wit:*

I hereby certify that the foregoing is a true copy from the original filed and recorded in the office of the register of wills for Washington county aforesaid.

Witness my hand and seal of office, this 4th day of March, A. D. 1863.

[SEAL.] Z. C. ROBBINS,
Register of Wills.

Answer of Marshall Brown.—Filed 14 *Ap'l*, '63.

The answer of Marshall Brown to the petition of John Wiley and Emily F., his wife, in the orphan's court of the District of Columbia:

This respondent answering, says he admits the death of the said Tillotson P. Brown, intestate, the granting by this honorable court of letters of administration on his personal estate to the said Elizabeth Brown, (but he does not admit that the said Elizabeth was or is the widow of said Tillotson P. Brown;) that more than twelve months have elapsed since the granting of the said letters of administration; that an order has been passed for the payment of the creditors,
8 and distribution among the distributees of the said estate on the 7th of February instant.

He says further, that the said Tillotson P. Brown, to the best of his knowledge and belief, never was married; but if he ever was married to the said Elizabeth Brown, he was not the father of the said Emily F. Wiley.

He shows that the next of kin of said Tillotson P. Brown are the respondent, who is the only brother, and Jesse B. Haw, the only child of a sister of said Tillotson P. Brown, now deceased, and George B. Prentice, who is the only surviving child of a half sister of said Tillotson P., now deceased, and they and they only are entitled to distribution of said personal estate, and this he prays may be inquired of by an issue to be tried in due form of law.

JOS. H. BRADLEY,
For Respondent.

DISTRICT OF COLUMBIA, *Washington County, to wit:*

I hereby certify that the aforegoing is a true copy from the
9 original filed and recorded in the office of the register of wills for Washington county aforesaid.

Witness my hand and seal of office this 4th day of March, A. D. 1863.

[SEAL.]

Z. C. ROBBINS,
Register of Wills.

Answer of Jesse B. Haw.—Filed 14 *Ap'l*, 1863.

The answer of Jesse B. Haw to the petition of John Wiley and Emily F. Wiley, his wife, in the orphans' court of Washington county, in the district of Columbia:

This respondent answering says, he admits the death of the said Tillotson P. Brown, intestate, the granting by this honorable court of letters of administration on his personal estate to the said Elizabeth Brown, (though he does not admit that the said Elizabeth was or is the widow of said Tillotson P. Brown;) that more than twelve months have elapsed since the granting of the said letters of administration; that an order has been passed for the payment of the creditors and distribution among the distributees of the said estate, on the
10 seventh day of February instant.

He says further that the said Tillotson P. Brown, to the best of his knowledge and belief, never was married; but if he ever was married to the said Elizabeth Brown, he was not the father of the said Emily F. Wiley.

He shows that the next of kin of the said Tillotson P. Brown, are this respondent, who is the only child of a sister of the said Tillotson P. Brown, now deceased, Marshall Brown, the only brother of the said Tillotson P. Brown, and George B. Prentice, who is the only surviving child of a half-sister of said Tillotson P. Brown, now deceased; and that they and they only are entitled to distribution of said personal estate; and this he prays may be inquired of by an issue to be tried in due form of law.

DAVIDGE & INGLE,
for Respondent.

DISTRICT OF COLUMBIA, *Washington County, to wit:*

I hereby certify that the aforegoing is a true copy from the original filed and recorded in the office of the register of wills for Washington county aforesaid.

Witness my hand and seal of office, this 4th day of March, A. D. 1863.

[SEAL.]

Z. C. ROBBINS,
Register of Wills.

11 *Decree of orphan's court.—Filed therein Feb'y 10th, 1863.—Filed in law 14th Ap'l, 1863.*

Ordered, upon the petition of John Wiley and Emily F. Wiley, and the answers of Marshall Brown and Jesse B. Haw, filed thereto, that the following issues be sent to the circuit court of the district of Columbia for Washington county for trial, viz:

1st. Whether the petitioner Emily F. Wiley is the child of Tillotson P. Brown, deceased?

2d. Whether the said Tillotson P. Brown was ever married to the mother of said Emily F. Wiley? and

3d. Whether after said marriage said T. P. Brown ever acknowledged the said Emily to be his child?

We agree that the above issues may be ordered by judge Purcell. Feb. 7, 1863.

R. J. BRENT, *for Petitioners.*
J. H. BRADLEY,
DAVIDGE & INGLE,
for Respondents.

DISTRICT OF COLUMBIA, *Washington County, to wit:*

I hereby certify that the aforegoing is a true copy from the original, filed and recorded in the office of the register of wills for Washington county aforesaid.

Witness my hand and seal of office, this 12th day of February, A. D. 1863.

[SEAL.] Z. C. ROBBINS,
Register of Wills.

12 Proceedings before the supreme court of the district of Columbia, at a special term or circuit court for said district, commencing on Tuesday, the seventh day of November, 1865.

TUESDAY, *November* 21, 1865.

The court resumes its session according to adjournment; Justice Olin, presiding.

EMILY F. WILEY
v. } 200 law.
MARSHALL BROWN.

Comes as well the parties by their attorneys, Messrs. Norris, Brent, and Merrick, for the petitioner, as Messrs. Bradley, sr., and Davidge for the respondent; and thereupon comes a jury of good and lawful men of the district of Columbia, to wit: William H. Carrico, Richard Roberts, E. H. Barrett, Hiliary Smith, Peter Berry, John L. Kidwell, Augustus Dorsey, Bernard Hays, Frederick G. Roler, John M. Starke, Richard S. T. Cissell, and Alexander Rutherford, who being duly elected by the par-

13 ties, and sworn well and truly to try the issues above joined, are by the court respited, and, with the consent of the parties, permitted to separate till ten o'clock to-morrow morning.

WEDNESDAY, *December* 20, 1865.

The court resumes its session according to adjournment; Justice Olin, presiding.

EMILY F. WILEY
v.
MARSHALL BROWN. } No. 200 law.

And now again come here the parties aforesaid, by their attorneys aforesaid, and the same jury who were respited yesterday; and after receiving the instructions of the court, they retire to consider of their verdict in charge of an officer.

SATURDAY, *December* 23, 1865.

The court resumes its session according to adjournment; Justice Olin, presiding.

EMILY F. WILEY
v.
MARSHALL BROWN. } No. 200 law.

14 And now again come here the parties aforesaid by their attorneys aforesaid, and the same jury to whom the case was submittted on the 20th instant, and who upon their oath say, that they find the issues aforesaid in favor of the petitioner, Emily F. Wiley, to wit:

1st. That the said Emily F. Wiley is the child of Tillotson P. Brown, deceased.

2d. That the said Tillotson P. Brown was married to the mother of said Emily F. Wiley; and

3d. That, after said marriage, said Tillotson P. Brown did acknowledge the said Emily to be his child.

And thereupon the respondent, by his attorney, moves for a new trial.

Bills of exceptions.

In the supreme court of the D. C.

WILEY
v.
BROWN. } At law, No. 200.

15 At the trial of the above-entitled cause, the petitioner Emily F. Wiley, to support the several issues, gave evidence tending to prove that she was the bastard child of Elizabeth Phillips, begotten on her body by Tillotson P. Brown, in the month of June, 1834, and born on the 31st of March, 1835; that on the 20th of Nov., 1859, her said parents were duly married, and that subse-

quently to said marriage, said Tillotson P. Brown acknowledged her to be his child, and the pet'r further offered in evidence under the issues in this case the declaration of said Brown made at sundry times before said marriage and whilst living in concubinage with said Elizabeth Phillips, as to the paternity of the petitioner, E. F. Wiley; which offered evidence was objected to as inadmissible to support said first issue, but said objection was overruled and the evidence allowed to be given to the jury in support of said issue: to which ruling of the court the def't excepts, and prays the court to sign, seal, and cause to be enrolled this his first bill of exceptions, which is accordingly done.

[SEAL.] A. B. OLIN, *Justice.*

16 *2d bill of exceptions.*

At the further trial of this cause, and after the evidence stated in the foregoing bill of exceptions, which is made part hereof, the petitioner offered evidence tending to prove that prior to 1843, the said T. P. Brown placed the petitioner at a boarding school in Newark, Delaware, as his daughter, and paid her expenses at such school; and then offered in evidence certain letters written by said petitioner in 1844, while at said school, to her mother thus living in concubinage with the said T. P. Brown, addressed to said T. P. Brown, (or to his care,) in which letters the petitioner spoke of said Brown as her father; and also in connection therewith, offered in evidence a letter written by the petitioner to said Brown, and further offered to show that said letters were sent by mail and received by said Brown, and read by him and then handed to the mother of the petitioner, and that in said last letter the said petitioner spoke of said Brown as her father. This evidence so offered was objected to on the part of the def'ts, and the objection overruled, and said evidence was permitted to go to the jury. To which ruling and decision of the court the counsel for the defendants then and there excepted; and the court signs and seals this 2d bill of exceptions.

[SEAL.] A. B. OLIN, *Justice.*

17 *3d bill of exceptions.*

After the evidence mentioned in the foregoing exceptions made part hereof, the petitioner further offered in evidence the following certificate:

No. 1.

WASHINGTON, *April* 24, 1849.

I certify, to all whom it may hereafter concern, that I first became acquainted with Mrs. Elizabeth Brown in the year 1834, having been sent for by Mrs. Dodds, in whose house Mrs. B. then resided, to visit her in a state of illness. Mrs. B. was expecting to be confined in about 3 or 4 months. On the 31st day March, as shown by my day-book, in the year 1835, I was summoned to attend Mrs. B., being

in labor, and delivered her of a female child, whom she afterward named Emily Frances. I have been acquainted with Mrs. B. ever since, and am fully and thoroughly persuaded of the identity of the same Emily Frances.

W. F. CONDICT.

Witness: T. P. BROWN.

Having first given evidence to prove that the words "witness, T. B. Brown" at the foot thereof were in the handwriting of said Brown, and that said certificate was prepared at or about the date thereof by Dr. Condict, whose name is signed thereto, and
18 further offered in evidence the following entries, in pencil, in a pocket testament belonging to the said mother of petitioner:

T. P. Brown was born Feb'y 11th, 1815.
M. B. was born Sept. 4th, 1816.
E. Haw was born July 8th, 1813.
Emily Brown, born 31st March, 1835.

Having first offered evidence to show that said entries were in the handwriting of said Brown, to which evidence, as applicable to the first issue, the defendant objected, and asked the court to say that the same did not tend to prove said first issue; to all which offered evidence the defendant objected, which objection was overruled, and said certificate and entries allowed to be read and considered by the jury in support of the first issue, to which ruling the def't excepts, and prays the court to sign, seal, and cause to be enrolled this his 3d bill of exc's; which is accordingly done.

[L. S.] A. B. OLIN, *Justice.*

19 *4th bill of exceptions.*

At the further trial of this cause, after the evidence stated in the foregoing bills made part hereof, the def't, to rebut any inference which might be drawn from declarations, conduct, and acts of said Brown towards the petitioner down to the year 1841, all which the pet'r was allowed to give in evidence, offered to prove that from the time the mother of pet'r went to reside with Mrs. Dodds, in Oct., 1834, down to 1841, when she went to live with said Brown in his house as his mistress, she lived the life of a common prostitute, and during all said time kept the pet'r with her; which offered evidence was objected to, and the objection sustained by the c't; to which ruling the def't excepts, and prays the court to sign, seal, and cause to be enrolled this his 4th bill of exceptions; which is accordingly done.

[L. S.] A. B. OLIN, *Justice.*

Petitioner was not born in 1834.

20

21 *5th bill of exceptions.*

At the further trial of this cause, and after the evidence set forth in the foregoing bills made part hereof, the defendant having given evidence tending to prove that the mother of petitioner was brought to the city of Washington, in the month of September, 1834, by a Colonel Larned, and by him carried to a bawdy house in said city, at which he had engaged rooms for her, and where she resided for about three weeks, during which time she was frequently visited by said Larned as a kept woman, and driven out from time to time by a hackman employed by him, and subsequently removed to another bawdy house, then offered evidence to show that while at Mrs. Dodd's, and when in advanced state of pregnancy, she was cared for and all her wants supplied by said Larned, and at his expense; and that after the birth of petitioner as aforesaid she was, with the child, driven out from time to time by hackmen employed by said Larned, whose attentions to her and said child were constant, though secret; and that after her removal from Mrs. Dodd's where she lived about 4 mo's, he rented and furnished a dwelling-house in said city for her and said child, and supplied all their wants, and continued to
22 live with her as his kept mistress until January, 1836; and that his conduct towards said child was such as could proceed from one who supposed himself the father. Upon which the court ruled that the defendant might give any evidence with regard to the said Elizabeth Brown down to the time when she became visibly pregnant with the said petitioner; but that, in support of the issues joined in this case, evidence of her intercourse with other men after she had so become visibly pregnant was not competent. To which ruling def't excepts, and prays the court to sign, seal, and cause to be enrolled this his 5th bill of excep's; which is accordingly done.

[L. S.] A. B. OLIN, *Justice.*

23 *6th bill of exceptions.*

At the further trial of this cause, after the evidence stated in the foregoing bills, made part hereof, and after the petitioner had given evidence tending to prove that the said Brown was living as a clerk in his father's hotel, in Washington, down to the year 1841, when he rented a house; that from 1835 down to 1841 he visited the said Elizabeth Brown regularly and secretly, and that his intercourse with her was by agreement between them kept secret from motives of policy, lest he might incur the displeasure of his father, and thereby be disinherited; and had been allowed to give evidence of the fact that in 1841 said Brown, who was then living in concubinage with her mother, sent the petitioner to school, and for several years paid the bills for schooling, and all other acts, conduct, and treatment and declarations on the part of said Brown, from which the jury might infer that he believed himself to be the father of the petitioner; the defendant, to rebut any inference which might be drawn from said acts, conduct, treatment, and declarations as regards the paternity of the petitioner, and having given evidence tending to prove that

the said Brown first became acquainted with the mother of the
24 petitioner in the winter of 1838–'9, and that the petitioner was adopted by said Brown after he formed an illicit connection with said mother, offered to prove that after the residence of petitioner in the house rented and furnished by Larned, as aforesaid, the mother removed, in January, 1836, to a house on Pennsylvania avenue, taking the petitioner with her; that there she was kept by Ben. Harding as his mistress, and was subsequently kept by John White as his mistress; that subsequently, in 1836, she removed from said house, taking the petitioner with her, and opened a brothel in a house on B street, and lived there as a common strumpet for the period of four years; that said house was an open and notorious house of ill fame during all said time, and was, as such, visited by lewd men and women, and that the same was during said time occupied by lewd women; and that said petitioner remained in said house exposed to the contaminating influences thereof until 1841, when the petitioner was sent to school as aforesaid, and said mother was removed elsewhere by said Brown, with whom she lived in open concubinage until the marriage, as aforesaid; all which offered evidence
was objected to, and the court ruled that any treatment by
25 said T. P. Brown of the said petitioner at any time was competent evidence, but that under the issues in this case it was not competent to prove the conduct, associations, and habit of life of the said Elizabeth Brown subsequent to the time when she became visibly pregnant with said petitioner, nor her treatment of said petitioner; objections sustained and the said evidence in all its parts ruled to be inadmissible; to which ruling defendant excepts, and prays the court to sign, seal, and cause to be this his bill of exceptions, which is accordingly done.

(Signed) A. B. OLIN, *Justice.* [SEAL.]

26 Proceedings before the supreme court of the District of Columbia, holding a general term, commencing the first Monday of May, in the year 1866.

MONDAY, *June* 4, 1866.

The court resumes its session according to adjournment. Present: Chief Justice Cartter and Justices Olin, Fisher, and Wylie.

EMILY F. WILEY
v.
MARSHALL BROWN. } 200 law.—Issues from the orphans' court.

This cause having been heard upon the record and bills of exceptions to the rulings of the circuit court, and argument of counsel, because it seems to the court that there is no error in said rulings; therefore it is considered that the motion for a new trial be, and the same is hereby, overruled, and this cause be, and the same is hereby, remanded to the circuit court, now in session, with directions to proceed therein according to law.

27 Proceedings before the supreme court of the District of Columbia, holding a special term, or circuit court for said District, commencing the third Monday, 21st day of May, 1866, in pursuance of the rule of court.

WEDNESDAY, *June* 6, 1866.

The court resumes its session according to adjournment, Justice Olin presiding.

EMILY F. WILEY
v. } 200 law.
MARSHALL BROWN.

Ordered by the court, this 6th day of June, 1866, that the finding of the jury, on the issues sent to this court from the orphans' court of the District of Columbia for Washington county, be certified by the clerk of this court to said orphans' court.

Filed 8 December, 1866.

O

90 D. Circulation for two
Supplemental

In the Supreme Court of the United States.

MARSHALL BROWN
vs. } No. 372.
EMILY F. WILEY.

The motion to dismiss ought to be overruled for the following reasons:

The Writ of Error brings up the judgment of the Supreme Court of the District of Columbia. (R. 10.)

The object of the Writ is to obtain a reversal of that judgment, and not of the order subsequently passed. (R. 11) of the judge holding the circuit.

That order would, of course, fall with the reversal of the judgment. But the order is in the nature of an execution of the judgment, and admitted not to be the subject of a Writ of Error.

Under the act of March 3d, 1863, reorganizing the Courts in the District of Columbia, this Court can only recognize the Supreme Court of the District of Columbia thereby created. See sec. 11 of the act.

Can the judgment of the Supreme Court of the District of Columbia be re-examined by this Court?

Is it a final judgment or order within the meaning of the act of February 27, 1801, s. 8, and of March 3, 1863, s. 11?

25 St 106

It will be observed that neither of these laws requires the final judgment or order to be rendered in a suit pending in a Court as required by the Judiciary Act 1789, s. 22.

It will also be observed that whilst under that act, only final judgments or decrees can be re-examined, the jurisdiction as respects the District is broader and embraces all final judgments, orders, or decrees.

The only matters in controversy in the Orphans' Court were those embraced in the issues sent for trial into the Court below. (R. 2–5.)

Under act of Assembly of 1798, ch. 104, sub. ch. 8, s. 20 and sub. ch. 15, secs. 16 and 17, in pursuance of which, the issues were sent into the Supreme Court for trial. The verdict of the jury destroyed the claim of Marshall Brown to the succession. Van Ness v. Van Ness, 6 How., 62–67.

The judgment of the Supreme Court of this District overruling the exceptions and remanding the cause to the judge holding the Circuit Court to be proceeded in according to law, was, in substance, a judgment or order that the certificate should issue.

The inferior tribunal had no discretion. Here there is a judgment to the effect, that there is no error in the exceptions, and ordering the issue by a subordinate tribunal, of a certificate to another Court, upon receipt of which, that Court MUST pronounce judgment, destroying the claim of the Plaintiff in Error.

Is such a judgment a final judgment or *order*? Does it not necessarily dispose of the cause?

There is but one thing that the judge holding the circuit can do, and that is to certify the verdict. And there is but one thing that the Orphans' Court can do upon the receipt of the certificate, and that is to render judgment against the claim of the Plaintiff in Error to the succession.

Does not, then, the judgment of the Supreme Court of this District necessarily dispose of the cause? If it does not technically render judgment in the cause, is it not such a final order as is within the Act of February 27, 1801?

The case of Van Ness vs. Van Ness is supposed by counsel opposed to be conclusive as to the present motion; but the difference between that case and the present, arising from the Act of March 3, 1863, abolishing the Circuit Court, and organizing the Supreme Court of the District of Columbia, is most manifest.

As the law stood when Van Ness *vs.* Van Ness was tried, the Circuit Court had not the power to enter judgment. It could, after the rendition of the verdict, grant a new trial, but could do nothing more. A new trial was not applied for; but, had it been, a mere application to the discretion of the Court would not have supported a writ of error. Sparrow *vs.* Strong, 3 Wallace, 97–105, and cases cited.

The Circuit Court had no power to do more than certify the finding of the jury. That really was no judgment or order in any legal sense. It was simply a certificate of a physical fact of record, and is so treated in Van Ness *vs.* Van Ness.

The only error there could be, was not error in judgment, for there was no judgment in a legal sense, but error as to the fact, whether the certificate faithfully, transcribed in the finding of the jury.

The case is wholly different under the law of March 3d, 1865.

By the 1st clause of the 8th section of that act, at the trial of any cause, the right to except is allowed.

And under that clause the right to a new trial is absolute, if any exception be sustained. The right is not addressed to the discretion of the Court. To put any such construction upon it, would necessarily destroy the right of appeal to this Court. As the law has been settled by the Court below, exceptions taken at the trial of right, entitled the party to a new trial, wholly irrespective of the discretion of the Court.

The construction of the law was fixed by the rule of the Court below, (Rule 99,) whereby it is provided, that in case of misdirection,

or where evidence is improperly received or rejected, a new trial "shall be granted as of right."

But by the second clause of the above section of the act of 1863, the Judge who tries the cause may, after the trial, and though no exception be taken at the trial, entertain in his discretion a motion for a new trial, upon exceptions offered or for insufficient evidence, or for excessive damages.

In all other respects, a party aggrieved, is remanded to the judgment of the Court who tries the cause. The Judge, however, is not bound to entertain the motion. If he does, an appeal is allowed to the Court in general term.

It is apparent, that the 1st clause of the 8th section of the act relates to exceptions under the Statutes of Westm. 2, (13 Ewd., I ch. 31,) by which, and the uniform practice under it, the taking of exceptions is confined to the trial. (See The Onondaga Mutual Insurance Company v. Miriard 2, Comsotck, 98, under a system from which that constructed by the act of 3d of March, 1863, was borrowed; and also, 3d Bl. Com., 372; 2d Tidd's Practice, 786.

The second clause creates a means, whereby a party failing to except regularly at the trial, may still have in certain cases, and at the discretion of the Judge trying the cause, the privilege of an appeal to the Court in general term.

The two provisions of the sections are wholly distinct. The one entitling the party to the only means whereby an appeal can be sought to this Court, and the other an appeal to the discretion of the Court below.

It is not contended here that a Writ of Error would lie to this Court from the rulings of a Judge trying the cause.

In the present case the record shows that the Bills of Exception were regularly taken at the trial, in conformity with the statute of Westm., 2, adopted in the State of Maryland before the cession of this District.

There was also a motion filed for a new trial, which was overruled and an appeal was taken therefrom to the Court in General Term.

But such motion was not a waiver of the exceptions taken at the trial. (United States vs. Hodge, 6 How., 279.)

Nor did it in any manner effect the absolute right of the Plaintiff in Error to a *venire de novo*, if any erroneous ruling was made at the trial of the cause, and duly excepted to. (McLanahan vs. The Universal Ins. Co., 1 Pet., 170.)

The plain distinction, then, between Van Ness vs. Van Ness and the present case is, that in the former the Circuit Court had no control over the verdict, save simply to grant, in its discretion, a new trial, which was never applied for; and the refusal to grant which, if asked, could not support a Writ of Error.

Whilst in this case the verdict was in the keeping of the Supreme Court of this District, whose duty it was, for any error duly excepted to at the trial, to order a *venire de novo*.

In the former case the right of the party to a new trial lay in the sound discretion of the Court. In the present that right was absolute. (McLanahan vs. Universal Ins. Co., 1 Pet., 170.)

Any other construction of the first clause of the 8th section of the Act of March 3, 1863, would deprive a party aggrieved of redress of Writ of Error from this Court, which was not the intention of Congress, as expressly declared by the 11th section of that Act.

There was, then, in the present case, judicial judgment, in the strictest legal sense of the term, to be exercised by the Supreme Court of this District, and no mere certifying to a fact, as in Van Ness *vs.* Van Ness; and that judgment, when it passed into record, determined the controversy, both in the Court below and the Orphans' Court; and yet it is contended on this motion that the action of a Court which adjudges such determination in a particular way, though in form and substance a judgment, is neither a final judgment nor a final order.

What is a final order under the act of February 27, 1801, if this be not one? It would appear that the term final order expressed in that law, and omitted in the Judiciary Act of February 27, 1801, was so expressed for the purpose of embracing precisely such a case as is here presented.

JOS. H. BRADLEY,
W. D. DAVIDGE.

Supreme Court of the United States.

MARSHALL BROWN
vs.
EMILY F. WILEY.
No. 372.

Brief of Counsel for Defendant in Error on motion to dismiss the Writ of Error for want of jurisdiction.

A petition was filed in the Orphans' Court of the District of Columbia by John Wiley and Emily F. Wiley, his wife, setting forth that the said Emily was the child of Tillotson P. Brown, deceased, and his sole heir and distributee; that her mother, Elizabeth Brown, the widow of the said Tillotson, had duly administered upon his estate; that a surplus was left in her hands from the assets of the estate, and praying that such portion of the same as the Petitioner was entitled to receive might be paid over to her.

Marshall Brown thereupon filed an answer to said petition, setting forth that he was the brother of said Tilloston, and alleging that the said Tilloston was never married to the said Elizabeth Brown, and that if he ever was married to the said Elizabeth Brown, the Petitioner, Emily F. Wiley, was not his child.

A similar answer was filed by Jesse B. Haw, since deceased, who claimed in right of his mother, a deceased sister of the said Tillotson P. Brown.

Thereupon the Orphans' Court, on the 10th day of February, A. D. 1863, by consent of the parties, and under the authority of the act of the General Assembly of Maryland of 1798, ch. 101, Sup. chap. 15, sec. 17, awarded the following issues to be sent to the Circuit Court of the District of Columbia:

1st. Whether the Petitioner, Emily F. Wiley, is the child of Tillotson P. Brown, deceased?

2d. Whether the said Tillotson P. Brown was ever married to the mother of said Emily F. Wiley?

3d. Whether, after said marriage, said Tillotson P. Brown ever acknowledged the said Emily to be his child?

These issues were submitted to a jury at a special term of the Supreme Court of the District of Columbia, held November, A. D. 1865, and a verdict rendered thereon as follows:

1st. That said Emily F. Wiley is the child of Tillotson P. Brown deceased.

2d. That the said Tillotson P. Brown was married to the mother of the said Emily F. Wiley.

3d. That after said marriage, said TillotsonP. Brown did acknowledge the said Emily to be his child.

A motion for a new trial was made, on exceptions taken at the trial, which was heard before all the judges at a general term of the Supreme Court of the District of Columbia. The motion was overruled, and the cause remanded with directions that the same should be proceeded in according to law.

Thereupon an order was entered by the Court before which the issues had been tried, directing that *the finding of the jury on the issues sent from the Orphans' Court be certified by the Clerk to said Orphans' Court.*

The Writ of Error in this case was sued out that the aforegoing order might be brought up to this Court.

1. The power of the Supreme Court of the United States to re-examine the judgments, orders, or decrees of inferior courts, extends to such cases only as are provided for by Statute.

Barry v. Mercien, 5 How., 120.

2. Under the acts of Congress authorizing the Supreme Court of the United States to re-examine the judgments, orders, or decrees of the Supreme Court of the District of Columbia, such an order as that entered by the Court in this case is not subject to review on Writ of Error.

Act of 1801, February 27th, section 8.
Act of 1863, March 3d, section 11.
Van Ness v. Van Ness, 6 How., 62.

The authority of the Supreme Court of the United States to re-examine the judgments, orders, or decrees of the Supreme Court of the District of Columbia, is defined and limited by the acts of Congress above referred to.

The act of 1801 had reference to the Circuit Court of the District of Columbia; and by sec. 8 provided that, "*any final judgment, order, or decree in said Circuit Court * * * may be re-examined, reversed, or affirmed in the Supreme Court,*" &c.

Under this law the exact question now before the Court came up on a motion to dismiss a Writ of Error, directed to the Circuit Court of the District of Columbia, to bring up for review an order of that Court directing that *the finding of the jury on issues sent from the Orphans' Court be certified to said Orphans' Court.*

Van Ness v. Ness, 6 How.

The act of March 3d, 1863, abolishes the Circuit Court of the District of Columbia and establishes in its stead the Supreme Court of the District of Columbia.

By sec. 11 of this act it is provided as follows: "*Any final judgment, order, or decree of said Court may be re-examined and reserved or affirmed* in the Supreme Court of the United States upon Writ of Error or Appeal, *in the same cases* and *in like manner as is now provided by law* in reference to final judgments, orders, or decrees of the Circuit Court of the United States for the District of Columbia."

The language of this section, in designating the orders and judgments of the Supreme Court of the District of Columbia which may be re-examined by the Supreme Court of the United States, is *identical* with the language of sec. 8 of the act of 1801.

The act of 1863, moreover, by express terms, limits the cases in which an Appeal or Writ of Error may be taken to *such cases* as were provided for by the act of 1801.

Therefore, the decision in the case of Van Ness v. Van Ness is conclusive upon the question now submitted, and the order of the Supreme Court of the District of Columbia is not such a *final order or judgment* as this Court is authorized to re-examine on a Writ of Error.

R. J. BRENT,
R. T. MERRICK,
Of Counsel for Defendant in Error.